SUPREME COURT, U. S.

No. 75-809

In the Supreme Court of the United States

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MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1975

AFRO-AMERICAN PATROLMEN'S LEAGUE, INC.,

Petitioner,

vs.

JAMES B. CONLISK, JR., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SORG/CHICAGO U.S.A.

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Petitioner Afro-American Patrolmen's League respectfully prays that a Writ of Certiorari issue to review the decision of the court below holding that petitioner may not maintain the action in this case, the Writ to issue only in the event this Court should grant the petition for a writ of certiorari in No. 75-606, at this Term, filed by respondents.

OPINION BELOW

The Opinion of the Seventh Circuit in the present case, reported at 520 F.2d 1, is reproduced in the appendix to respondents' petition in No. 75-606. References in parentheses are to that appendix. The Opinion of the United States District Court for the Northern District of Illinois (The Honorable Joseph Sam Perry, Judge) is reported at 367 F. Supp. 476.

JURISDICTION

The Opinion of the Seventh Circuit was handed down June 30, 1975. A timely petition for rehearing was denied on September 3, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is an organization of policemen, whose purpose and activities include insuring that police officers conform to lawful standards of conduct and which has suffered sufficient injury in fact to have standing as a plaintiff in a suit to remedy widespread unconstitutional police conduct, deprived of standing merely because its members themselves are policemen?

STATEMENT OF THE CASE

The basic facts concerning this litigation are stated in respondents' petition for certiorari in No. 75-606 and in petitioners' brief in opposition to that petition. The specific facts relating to the question presented on this conditional cross-petition are as follows.

This lawsuit was brought by three organizations, each alleging active involvement in efforts to remedy a wide-

spread pattern of unconstitutional police misconduct, including the operation of complaint services which assisted hundreds of citizens aggrieved by such police misconduct. The court below upheld the standing of the other two organizations and recognized that the petitioner was in a virtually identical position with respect to the allegations showing an "injury in fact" that would support standing. However, the court below denied standing to the League because its members are policemen, on the ground that the remedy sought could result in some unidentified League members who now escape disciplinary sanctions becoming subject thereto, thus creating a "potential conflict of interest." (16a)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW IN DISMISSING THE AFRO-AMERICAN PATROLMEN'S LEAGUE CONFLICTS WITH THE DECISIONS OF THIS COURT AND WITH OTHER COURTS OF APPEALS AND RAISES AN IMPORTANT FEDERAL QUESTION.

In dismissing petitioner from this case, the court below cited no supporting authority. (16a) It appears that the court recognized that the League had suffered the requisite "injury in fact" to have standing to challenge the legality of respondents' actions. *Cf., Sierra Club* v. *Morton,* 405 U.S. 727 (1972). However, it held that there existed a conflict between the League's prosecution of this suit and the potential interests of some of its members. The court reasoned that since the purpose of the suit was to remedy inadequate police disciplinary procedures, some unidentified members of the League might be harmed as a result of successful prosecution in this action, because an improved disciplinary system might conceivably "result in AAPL members who now escape disciplinary sanctions becoming subject thereto." (16a)

Though the court below did not explicitly so state, it seemed to be drawing on an analogy to the law of class actions, where it has long been held that a pervasive conflict of interest may create inadequate representation of the class by the named representatives which violates due process. *Hansberry* v. *Lee,* 311 U.S. 32 (1940). However, in *Hansberry* there existed a total, irreconcilable conflict established on the record. Indeed, the inadequacy of representation bordered on the fraudulent.

Since the decision in *Hansberry,* several lower courts have made clear that the mere existence of a possible conflict of interest between the named representatives and certain portions of the class will not be sufficient to characterize the representation as "inadequate." In *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920, 937 (2d Cir. 1968), the court held that "the fact that some members of the class were personally satisfied with Defendants' [challenged policies] is irrelevant." In *Rosado* v. *Wyman,* 322 F. Supp. 1173, 1193 (E.D.N.Y. 1970), *aff'd,* 437 F. 2d 619 (2nd Cir. 1970), 402 U.S. 991 (1971), the court held the representative parties adequate even though some portions of the class benefited to the exclusion, and potentially the detriment, of another portion. See also *Giordano* v. *Radio Corporation of America,* 183 F.2d 558, 560 (3rd Cir. 1950), involving a union membership which, on the evidentiary record, was sharply divided on the central issue of the case.

Here, success in this litigation would be to the benefit of the League, the hundreds of aggrieved citizen clients whom it has assisted, and virtually all of its members, who have committed themselves to assuring that police officers conform to lawful standards of conduct. Even by the inference of the court below, success here would be to the detriment only of an unidentified few who would wish to "escape disciplinary sanctions" for their unlawful conduct.

As a matter of law, even these unidentified few have no legally cognizable interest that is contravened by the League's prosecution of this action, for no policeman could have a valid interest in shielding his unconstitutional conduct from proper disciplinary action.

The ruling of the court below is not only without precedent in the law of standing and incorrect in terms of the law of class actions but also raises a vitally important question concerning the standing of persons who seek to challenge in the courts the unconstitutional practices of the institutions in which they work. On the record (i.e., the allegations of the complaint), the League has dedicated itself to the enforcement of constitutional standards of conduct in police work and has engaged in many activities on behalf of the public and on behalf of hundreds of aggrieved citizen clients in furtherance of that purpose.

If allowed to stand, the decision below might exclude from the courts those within institutions who seek to ensure that their institutions function in a constitutional manner—the very persons who are most knowledgeable about the improper practices of the agencies in which they work. To conclude as a matter of law that a police organization is always precluded from challenging patterns of unconstitutional police conduct is to deprive the courts, in cases challenging those patterns, of advocates who can best provide the facts and perspectives that their supervisors would undoubtedly rather keep undisclosed.

This Court should review a ruling that has such an undesirable consequence for our legal system.

II.

IN DISMISSING THE AFRO-AMERICAN PATROLMEN'S LEAGUE AS A PLAINTIFF, THE COURT BELOW VIOLATED THE DICTATES OF RULE 12 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The case before the court below grew out of a motion to dismiss the action filed by respondents because of the al-

leged failure of petitioner and the other plaintiffs to state a claim upon which relief could be granted. Fed R. Civ. P. 12(b)(6). On such a motion, the allegations of the complaint are assumed to be true. *Cooper* v. *Pate*, 378 U.S. 546 (1964).

In their complaint, petitioner and the other plaintiffs have alleged nothing that would suggest the existence of the conflict which the court below inferred. Accepting the allegations of the complaint as true, it is clear that there is no conflict.

One of the purposes of the League is "to preserve and protect the rights of residents of Chicago against abusive and arbitrary police conduct [and] to assure that police officers conform to lawful standards of conduct." The League has undertaken a variety of activities in carrying out this purpose, including: establishment and operation of a program that has received complaints of police misconduct from hundreds of persons, including some of the individual plaintiffs below and has sought redress for these clients; programs and activities for education of the public with respect to police administration and conduct; formulation of proposals for specific reforms in police administration and conduct; meetings and negotiations with the responsible public officials to seek implementation of those proposals; and public advocacy of its purposes and proposals. Complaint, Paragraph 5.

It is firmly established in the law of class actions that adequacy of representation is a question of fact, to be raised and resolved in a trial court hearing. *Harris* v. *Palm Springs Alpine Estates, Inc.*, 329 F.2d 909 (9th Cir. 1964); *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 93-94 (7th Cir. 1941). No such hearing has been held in this case. Rather, the court below improperly transgressed its role by making a

factual finding contrary to the complaint on an issue that had never been raised in the trial court.

If a hearing had been held in the trial court, petitioner could have shown that the very essence of the League, as a police organization and as a group of black police officers, is that it has defined and unwaveringly pursued a definition of the police role that places its members in concert, not in conflict, with the community's interest in lawful and professional police behavior.

Petitioner could also have shown that the resolve of the League *and its members* to reject and oppose conflict of interest which the court infers was stated at the very outset, in the announcement of the League's formation in July, 1968:

> We are going to elevate the black policeman in the black community to the . . . image-status . . . of a protector of the citizenry and not a brutal oppressor.
>
> . . .
>
> We are husbands, fathers, brothers, neighbors and members of the black community. Donning the blue uniform has not changed this. On the contrary, it has sharpened our perception of our responsibilities as black males in a society seemingly unresponsive to the needs of black people. We see our role as the role of a protector of this community and that is the role we intend to fulfill.

Lastly, petitioner could have shown that membership in the League has never been open to any person merely because of his status as a policeman, even as a black policeman. It has always been a condition of membership that one subscribe to, and consistently conform to, the principle of strictly lawful conduct toward civilians.

Thus the failure of the court below to comply with the requirements of Rule 12, which dictate that there be no dismissal without a factual inquiry in the trial court as to the accuracy of the inference that a conflict of interest exists, substantially prejudiced the rights of both the Afro-American Patrolmen's League and its members.

CONCLUSION

For the foregoing reasons, in the event the Court should grant the petition for a writ of certiorari in No. 75-606, this petition for a Writ of Certiorari should likewise be granted.

Respectfully submitted,

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